IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9218 of 2007
For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GONDALALIYA PRABHUDAS PURANDAS - Petitioner(s)
Versus
MANAGER, PARSHUTAM POTTERIES WORKS CO. & 1 - Respondent(s)

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Appearance :
MR YV SHAH for Petitioner(s) : 1,
NOTICE NOT RECD BACK for Respondent(s) : 1,
MR.VARUN K.PATEL for Respondent(s) : 1,
NOTICE SERVED for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 01/05/2007

ORAL JUDGMENT

1. Heard learned Advocate Mr. YV Shah for the petitioner and Mr. Varun K. Patel for the respondent Management.

2. How the legal process has been misused by the party, this is the clear example thereof. Initially, dispute was raised by the petitioner before the labour court in reference no. 131 of 1994 wherein the labour court has set aside the termination dated 1st October, 1993 but since the respondent establishment had been closed, labour court has not granted order of reinstatement but granted only back wages for interim period by order dated 7.9.2003. Said award was published on 30.9.2004 and thereafter, recovery application was filed by the petitioner wherein employer had not remained present and ultimately labour court in absence of the employer, by order dated 30.4.2003, granted amount against the

employer to be recovered from the employer under the provisions of the Land Revenue Code by the Collector, Surendranagar District and recovery certificate was also issued by the labour court, Surendranagar. Thereafter, petitioner had approached this court by filing SCA No. 7307 of 2004 with grievance that the district collector is not taking any steps for recovering the amount specified in the recovery certificate. This Court has expected from the District Collector to take prompt steps for completing exercise and try to ensure recovery as far as possible within four months from the date of receipt of copy of this order in the said petition. Thereafter, respondent employer filed application under rule 26A of the Industrial Disputes (Gujarat) Rules, 1966 being Miscellaneous Application No. 3 of 2005 on 24.1.2005 along with an application for condonation of delay before the labour court wherein labour court passed order on

21.10.2005 with consent of both the parties wherein it was decided to pay Rs.15000.00 (Rs. Fifteen thousand only) to the workman by the employer for staying operation of the recovery certificate. Thereafter, miscellaneous application filed in recovery application no.3 of 2005 Exh. 5 was decided by the labour court, Surendranagar. Labour Court allowed it. With consent of the parties, Rs.15000.00 has been taken by the petitioner, being the amount of cost for reopening the original reference no. 131 of 1994 and decided to complete hearing within six months and date of hearing was fixed on 11.8.2006. Said order was passed on 7.7.2006. Thereafter, petitioner approached labour court by filing Miscellaneous Application NO. 5 of 2006 for review and for correction of the error committed by the labour court, Surendranagar. Labour Court rejected said application of the petitioner on 17.11.2006.

3. Learned Advocate Mr. YV Shah submitted that

after the award came to be published, the labour court is becoming functuous officio and, therefore, labour court is not having jurisdiction to decide the application filed by the respondents under rule 26A of the ID (Gujarat) Rules, 1966. In support of his submission, he placed reliance on the following decisions :

(1) Sangham Tape Co. versus Hans Raj, reported in (2005) 9 SCC 331.

(2) Mukundbhai Gunvantrai Bhatt v. Excell Industries Ltd. & Anr., reported in 1998 (1) GLR page 586.

(3) M. Jagdamba Dyeing & Printing and Anr. Versus Ramkumar Ramchal Mishra c/o Surat Silk Labour Union, reported in 2006 (1) GLH 545

(4)The Central Bank of India and others versus Their Workmen, etc. reported in AIR 1960 SC page 12.

4. It is required to be noted that there is mis-understanding on the part of the lawyer representing the petitioner. There is vast

difference in application of section 17A to the award and to the order passed by the labour court in recovery application. If the labour court has passed order under section 33-C-2 of the ID Act, 1947, then, section 17A would not apply because there is no need to publish order passed in recovery proceedings under section 33-C(2).

5. From the record, it is clear that the application was filed by the employer under Rule 26A against the award as well as against the order of the labour court in recovery proceedings. Looking to the award which has been passed by the labour court wherein advocate was engaged by the respondent, there was clear finding given by the labour court that this award has been passed by the labour court in absence of the employer. The respondent has filed reply in reference. Except that, no oral evidence led and no arguments were made that is how award is passed in absence of respondent, being ex

parte. Therefore, application was filed. That does not mean that it was an application for award alone and not for the recovery proceedings. Application under rule 26A is maintainable if the ex parte award has been passed by the labour court is being published but the orders passed by the labour court under section 33-C(2) of the ID Act, 1947 is not being published as not required under section 17A of the ID Act, 1947. As per Exh. 15 being Miscellaneous Application No.3 of 2005 in Reference No. 131 of 1994 and recovery application no. 3 of 2003 annexure F page 42, the labour court has after considering the facts on record, reopened the reference with consent of the petitioner and respondent after receiving Rs.15000.00 from the respondent by the petitioner. Those observations are at page 50 in order dated 7.7.2006. Thus, effect of the order of the labour court datd 7.7.2006 would be that for staying or postpoing the execution of

recovery certificate issued in recovery application, with consent of both the parties, amount of Rs.15000.00 paid to the petitioner by the employer has to be treated as the amount of cost and original reference no. 131 of 1994 stands reopened. Labour court has also ordered for completing the adjudication of the restored reference within six months while fixing next date of said reference proceedings as 11.8.2006. Thus, it is clear that the petitioner has pocketed amount of Rs.15000.00 from the respondent and Mr. Patel has made statement before this Court that has not been disputed by Mr. Shah. Thus, in fact, with consent of both the parties, execution and implementation of the recovery certificate has been postponed in the interest of justice as recorded by the labour court in order in Miscellaneous Application NO.3 of 2005 vide Exh. 8 dated 21.10.2005. Therefore, according to my opinion, once reference has been restored and

proceedings are pending before the labour court between the parties, petitioner ought to have participated in the proceedings before the labour court instead of raising such contentions in this petition. Filing of this petition against such order of the labour court amounts to misuse of court process. Labour court has no jurisdiction to review order as rule 31 provides only for correction of mistake, typographical error or clerical error and, therefore, for other contingencies, labour court is not having power to review its own order. There is no inherent power with the labour court for review either under the Act or under the rules and, therefore also, labour court has rightly rejected application of the petitioner by order dated 17.11.2006, therefore, in view of the aforesaid facts, according to my opinion, labour court has passed order with consent of parties and as a consequence thereof, petitioner has received

Rs.15000.00 from the respondent which statement has not been denied by the learned Advocate for petitioner and therefore, execution of the recovery certificate has been postponed and reference has been restored to original number and same is pending before the labour court. Therefore, according to my opinion, if the petitioner has consented for restoration of reference, then, he is estopped from subsequently challenging that order and the question of functuous officio was not raised at the relevant time while giving consent to the labour court and, therefore, now it is not open for the petitioner to raise such contention in this petition before this court. Further, in State of Gujarat, we are having the Industrial Disputes (Gujarat) Rules, 1966 which are giving such powers to the labour court under rule 26A for reopening the award passed ex parte in absence of any party to reference and therefore also, in

view of such powers invested in the labour court under the ID (Gujarat) Rules, 1966, it cannot be said that the labour court becomes functuous officio and in view of that also that contention of the learned Advocate Mr. Shah cannot be accepted and same is therefore rejected.

6. I have perused the memo of petition and relevant records which are annexed to the petition. Award was made by the labour court, Surendranagar in Reference No. 137 of 1994 dated 7.9.2002 wherein the Labour Court granted full back wages for interim period in favour of the petitioner with effect from 1.10.1993 till the date of closure of the establishment and in view of closure of the establishment, relief of reinstatement was not granted by the labour court. Said award of back wages was to be implemented by the employer within thirty days from the date of publication thereof. In said proceedings, respondent employer had remained silent.

Except reply vide Exh. 9, no participation in the said proceedings by the respondent employer. No oral evidence was led by the employer before the labour court in reference proceedings. No documents were produced by the respondent. Workman petitioner was not cross examined by the employer. No arguments were made before the labour court by the respondents, therefore, in substance, present award is ex parte award means passed in absence of the respondent. Similarly, recovery application no. 3 of 2003 dated 30.4.2003 has also proceeded ex parte in absence of the respondent and, therefore, it is also ex parte. Labour Court, Surendranagar issued recovery certificate dated 30.5.2003 of Rs.1,32,200.00. Special Civil Application NO.7307 of 2004 was filed by the petitioner wherein this court directed respondent no.1 collector to take prompt action for recovery and, thereafter, miscellaneous application no.3 of 2005 was filed by the respondent on

24.1.2005. In para 4 of the application, it is made clear that the negotiations are going on between the parties. Said application was filed by the employer for setting aside ex parte award and recovery order as referred to above. Application for condonation of delay was also filed along with the application for setting aside ex parte award. On 21.10.2005, labour Court Surendranagar passed order to postpone implementation of recovery certificate on the basis of the fact that the respondent has paid Rs.15000.00 in cash to the petitioner. Thereafter, labour court, Surendranagar has decided Miscellaneous Application NO.3 of 2005 on 7.7.2006. Labour Court has come to the conclusion that both the proceedings, namely reference proceedings and recovery proceedings have remained ex parte against the respondents and, therefore, considering the facts on record and arguments advanced by learned Advocates for both the parties, labour court passed order that the

recovery process as per recovery application and implementation of recovery certificate has been postponed and with consent of the petitioner or on concession being given by the petitioner while receiving Rs.15000.00 has also been set aside and it has been restored to the original number. Accordingly, both the proceedings were restored to original file. It is necessary to be noted that the petitioner has not raised contention before the labour court that after 30 days from the date of publication of the award, labour court would become functus officio. No such contention was raised by the petitioner before the labour court and about delay also, contention was not raised by the petitioner but on the contrary, ultimately, on the basis of the consent of the petitioner and considering the concession where initially petitioner was demanding Rs.25000.00 from the respondent and ultimately reduced to Rs.15000.00 but in

substance, award which has been considered ex parte has been set aside and similarly ex parte order and recovery application is also set aside on the basis of consent and receiving Rs. 15000.00 by petitioner from respondent. Contentions raised by the petitioner before this court have not been raised by petitioner before the labour court and, therefore, these are the contentions raised by petitioner for the first time before this court.

7. As regards decision in case of M. Jagdamba Dyeing & Printing and Anr. Versus Ramkumar Ramchal Mishra c/o Surat Silk Labour Union, reported in 2006 (1) GLH 545 cited by Mr. Shah before this Court, same is not applicable to the facts of this case only on the ground that no such contention was raised by the petitioner before the labour court. Petitioner has not objected delay and, further, on the basis of consent given, delay was condoned by the labour court. Therefore,

in the facts of the case before this court, this decision is not applicable. As regards another decision relied upon by Mr. Shah in case of Mukundbhai Gunvantrai Bhatt v. Excell Industries Ltd. & Anr., reported in 1998 (1) GLR page 586, it is also not applicable to the facts of the present case because it is relating to aspect as to when the award becomes final, the court has come to the conclusion that after expiry of 30 days from the date of publication of the award, it is becoming final and the award would come into effect and, therefore, tribunal is becoming functuous officio. In the said decision, the labour court has not considered rule 26A and 26B of the ID (Gujarat) Rules, 1966. As regards the contention raised by Mr. Shah that the statutory rules cannot enlarge the scope of section, relying upon AIR 1960 SC page 12 in the ID Act, 1947, the State Government has power to make statutory rules and

accordingly, statutory rules have been framed in the year 1966 wherein rule 26A and 26B have been framed giving right to the party against whom ex parte order/award has been passed by the labour court entitling such party to file application for setting aside ex parte order/award within thirty days from the date of publication of such order/award or receiving copy of such award. In this case, petitioner has not challenged Rule 26A and 26B of the ID (Gujarat) Rules, 1966 and, therefore, this decision is also not applicable to the facts of the present case.

8. As regards the decision in case of Sangham Tape Co. versus Hans Raj, reported in (2005) 9 SCC 331 relied upon by Mr. Shah, in the said decision, the apex court has held that after thirty days from the date of publication, labour court becomes functuous. In the aforesaid reported decision, there were no rules in Punjab and Haryana similar to the ID (Gujarat) Rules, 1966 giving right

to the party to file application for setting aside order/award passed ex parte. So, in absence of rule, the labour court becomes functuous officio after 30 days from the date of publication of such award but in case where rules have been framed and such rules are in existence, the labour court cannot become functuous officio because the labour court should have to entertain application under section 26A within thirty days from the date of publication and thereafter also, while condoning delay, if any, occurred in filing of such application, labour court can entertain such application and, therefore, in the facts of this case and also in view of the fact that the ID (Gujarat) Rules, 1966 are giving such powres to the labour court in Gujarat State, the labour court would not become functuous officio and, therefore, said decision of the apex court would not apply to the facts of this case. Said decision was recently considered by the Bombay High Court

in Shri Radhakrishna Mani Tripathi, Mumbai v. LH Patel & Anr. Reported in 2006 I CLR 743 where similar rules were there. Para 33 to 43 of the said decision being relevant, are reproduced as under:

“33.The dissection of the above relevant statutory provisions makes it clear that the Legislature in its wisdom has given complete freedom to the autorities under the Act to devise its own procedures for adjudication of a dispute referred to it. The Tribunal, therefore, can devise its own procedure to decide a Reference. However, if any Rules are made in that behalf, then,the Tribunal has to observe the said Rules. The adjudicating authority is required to enquire into the dispute referred to it and upon completion of the enquiry it has to make an award. Section 16(2) lays down the manner in which the award is required to be made. Section 17 mandates every award should be published within a period of 30 days from the dat of its receipt

by the appropriate Government in the manner it deems fit. Section 17(2) provides that an award published under sub section (1) of section 17 shall be final and shall not be called in question in any Court in any manner whatsoever. Rule 31-A of the Bombay Rules provides for publication of report of award. Sub rule (2) thereof provides that the State Government shall at the time of publication forward a copy thereof to the parties to the disputes. Rule 26(2) permits the aggrieved party to make an application to the Labour Court or Tribunal to set aside ex parte award within thirty days from the receipt of the copy thereof.

Consideration of Case Laws:

34. Having examined the statutory provisions and sweep thereof, let me turn to the precedents holding the field.

35. In case of Sangam Tape Company (cite supra), the Superme Court was concerned with the case decided by the Labour Court, Punjab. The Punjab Rules are identical with that of the Central Rules. The copy of relevant provisions of the Punjab Rules is also placed on record. Rules 22 and 24 of the Punjab Rules are identical with that of Rules 22 and 24 of the Central Rules. As against this, Rule 26(2) and 31A(2) of the Bombay Rules are different and

distinct unlike Central Rules.

36. In the case of Grindilays Bank Ltd. (cited supra) the Supreme Court was concerned with Rule 22 and 24 of the Industrial Disputes (Central) Rules, 1957. Rule 22 empowers the Labour Court ect. to proceed ex parte, however, there is no power for entertaining an application to set aside ex parte Award, unlike Rule 26(2) of the Bombay Rules. The Supreme Court, in these peculiar circumstances, was required to consider an application for setting aside the ex parte award. The Supreme Court in para 4 of the Judgment has taken note of the contention that neither the Act nor the Rules framed thereunder confer any power on the Tribunal to set aside ex parte award.

37. The Apex Court, after noticing the above contentions, observed in paras 5 and 6 as under:

> "In dealing with these contentions, it must be borne in mind that the Industrial Dispute Act, 1947 is a piece of legislation calculated to ensure social justice to both employers and the employees and advance progress of industry by bringing harmony and cordial relations between the parties. In other words, the purpose of the Act is to settle disputes between workmen and employers which if not settled, would result in strikes or lock-outs and entail dislocation of work, essential to the life of community. The scheme of the Act shows that it aims at settlement of all industrial disputes arising between the capital and Labour by peaceful methods and through the machinery of conciliation, arbitration and if necessary, by approaching the Tribunals constituted under the Act. It, therefore, endeavors to resolve the competing claims of employers and employees by finding a solution which

is just and fair to both the parties.

We are of the opinion that the Tribunal had the power to pass the impugned order if it thought it fit in the interest of justice. It is true that there is no express provision in the Act or rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are effectively for the purpose of doing justice between the parties. In case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary."

38. The Supreme Court laid down that even in absence of a specific provisions in the Act or Rule the Tribunal was empowered to pass appropriate order in the interest of justice. It further held that, even in the absence of express provisions in the Act or the Rule giving the Tribunal jurisdiction to entertain an application for setting aside the ex parte award; in case of that nature, the Tribunal should be considered as invested with such incidental or ancillary powers because there was no statutory prohibition.

39. As regards the provisions of Section 17 (A) of the Act, the Supreme Court observed as under:

" The contention that the Tribunal had become functus officio and, therefore, had no jurisdiction

to set aside the award and that the Central Government alone could set it aside, does not commend to us. Sub sec 3 of S. 20 of the Act provides that the proceedings before the Tribunal would be deemed to continue till the date on which the award becomes enforceable under S. 17(A). Under S. 17(A) of the Act, an award becomes enforceable on the expiry of 30 days from the date of the publication under Sec. 17. The proceedings with regard to a reference under S. 10 of the Act are, therefore, not deemed to be concluded until the expiry of 30 days from the publication of the award. Till then the Tribunal retains jurisdiction over the disputes referred to it for adjudication and upto that date it has the power to entertain an application in connection with such dispute. That stage is not reached till the award becomes enforceable under S. 17(A). In the instant case, the Tribunal made the ex parte award on December 9, 1976. That award was published by the Central Government in the Gazette of India dated December 25, 1976. The application for setting aside the ex parte award was filed by respondents no. 3, acting on behalf of respondent no. 5 to 17 on January 19, 1977, i.e. before expiry of 30 days if its publication and was therefore, rightly entertained by the Tribunal it had jurisdiction to entertain it and decide it on merits. It was however, argued that on April 12, 1977 the date on which the impugned order was passed, the Tribunal had in any event become functous officio. We can not exceed to this arguments. The jurisdiction of the Tribunal had to be seen on the date of the application made to it and not the date in which it passed the impugned order. There is no finality attached to an

ex parte award because it is always subject to its being set aside on sufficient cause being shown. The Tribunal had the power to deal with an application properly before it for setting aside the ex parte award and pass suitable orders (emphasis supplied.)

40. As regard the time in which an application for setting aside the ex parte award could be referred in case of a party governed by the Central Rule, the Supreme Court based on provision of S. 17 (A) laid down that the same should be within a period of of 30 days from the date of publication of the award. However, one more fact needs to be noticed here that the Central Rules does not have a provision similar to Sec. 31(A) of the Bombay Rules. The Apex Court in the above decision ruled that no finality is attached to an ex parte award and it can be set aside if sufficient cause is shown as to what evented the party from appearing before the Tribunal. The Supreme Court has also held that the Tribunal was empowered to pass appropriate order in the interest of justice.

41. In case of Anil Sood (Supra), the apex court was concerned with the case where the Tribunal as well as the High Court had refused tog rant application for setting aside an ex parte award. The argument on behalf of the respondent were in that case was that the appellant was served with the notice and did not appear and , hence, did not have any case for setting aside the award.

The apex court rejected the said contention and observed as under:

“5. This court in Grindlays' Bank Ltd. Case (supra)

examined the scheme of the provisions under the Industrial Disputes Act, and enunciated section 11 of the Industrial Disputes Act confers ample powers upon the tribunal to devise its own procedure in the interest of justice which includes powers which bring out the adjudication of an existing industrial dispute. Sub section 1 and 2 of section 11 of the Act thereby indicates the difference between procedure and powers of the tribunal under the Act while procedure is left to be devised by the Tribunal to suit carrying out its adjudication.

If this be the position in law, both the High Courts and the Tribunal fell into error in stating that the Labour court had become functus officio after making the award though ex parte. We set aside the order made and the award passed by the Labour court and affirmed by the High Court in this regard. In view of the fact that the learned counsel for the respondent conceded that the application filed by the appellant be allowed, set aside the ex parte award and restore the reference. To decide the matter a fresh, the parties shall appear before the Labour court on 11th December, 2000 to take further directions as regards the proceedings. As the matter is very old, it would be appropriate for the Labour court to dispose of the reference as expeditiously as possible but not later than six months from today. “

42. In the case of South Seas Distilleries and Breweries Pvt. Ltd. (supra), the learned Single Judge has laid down a law as under:

“.... A conjoint reading of Rules 26 and 31A would therefore show that the time to set aside the award unlike the Central Rules is within 30 days of the receipt of a copy of award by the party. Though the

award becomes final on publication and expiry of thirty days, the right to apply for setting aside the a ward may be in excess of 30 days if the rule as it exists is construed. Rule 26(2) as it stands requires the making of an application within thirty days of the receipt of the copy of the award. There is nothing like waiting for publication of the award. The Central Rules as interpreted in Grindlays Bank (1981 LIC 155) (supra) a view has been taken that an application can be made any time before the expiry of thirty days from publication of the award. There is no specific rule in the Central Rules unlike the Bombay Rules which provides the period during which the application is to be made..... "

"..... A duty is ca st on the State Government to send a copy of the award for publication to the Labour court or tribunal and at the same time to the parties. The application by the parties must, therefore, be within 30 days of receipt of the award. The subsequent communication by the Labour Court of the Tribunal is only a communication that the award has been published the second notice does not extent the period of limitation prescribed under Rule 26(2). the period of 30 days, therefore, expires on the expiry of the 30 days from the receipt of the copy of the award."

.....

"12. The following conclusion therefore, emerge:

(i)Under the Bombay Industrial Dispute Rules, the time for setting aside the award is 30 days from the date of receipt of the copy of the Award. As the Rule reads, even on the award becoming final on expiry of 30 days from the

publication of award under Section 17 (A) the Court or Tribunal does not become functus officio considering the Bombay rules. The time for setting aside the Award stands entended even after the expiry of 30 days from the date of publication.

(ii)If the Tribunal does not become functus officio even after expiry of 30 days from publication, considering Rule 26, the issue whether there can be an application for condonation of delay is not decided and is left open as it is not required to be decided on the fact of the case.

(iii)ON facts no case is made out to either interfere with the order rejecting the application for setting aside the ex parte award on the ex parte award itself.”

43. As against above, in the case of Mhatre Pen and Plastic Pvt. Ltd. (supra) there was no occasion for the Court to consider the provisions of Section 26(2) and 31A of the Bombay Rules, since none of these provisions was attracted on the facts of that case.”

9. Similarly, same aspect has has also been considered by the Orissa High Court in case of Reserve Bank of India Bhuvaneshwar vs Reserve Bank Employees Association & Anr reported in 2006 LLR 315. It has been

observed in para 6 and 7 of the said decision as under:

“6. Shri Sarangi, learned counsel for the opponent no. 1 workman, on the other hand, relied on a decision of this Court in the case of M/s. IDL Chemicals Ltd., v/s. Presiding Officer, Labour Court, Sambalpur, reported in (1991) 72 CUT L.T. 73, Division Bench of this Court faced with a similar question decided as follows :-

'5. It is argued that the application was incompetent after lapse of 30 days from the date of the publication of the award in the Gazette. Reliance was placed on the Grindlays Bank's case, 1981 Lab.I.C. 155 S.C. [supra] where the application has been filed within 30 days. The Supreme court has not observed in the said case that an application filed beyond 30 days is not maintainable. The finality which attaches to an award is subject to decisions in other proceedings including proceedings in

this Court under Articles 226 and 227 of the Constitution of India. The principles of Order 9 Rule 13 apply and an application can be filed if sufficient causes can be shown for its filing beyond 30 days. We give a very simple illustration. The employer or the worker meets with an accident on the way to the Industrial Tribunal or the Labour Court, sustains a head injury and remains under a comma till after expiry of 30 days from the date of publication of the award in the Gazette, would the employer or the worker in such circumstances have no remedy under law? Is the law so inexorable? We do not understand the decision in Grindlays Bank's case [supra] to lay down a rule that an application for setting aside an ex-parte award cannot be made after expiry of 30 days from the date of publication of the award in the Official Gazette. Such a rule would cause irreparable injury and

injustice in some cases. If sufficient cause is shown, the ex-parte award can be set aside. So in our opinion an ex-parte award can be set aside if sufficient cause is shown even beyond 30 days from the date of its publication in Official Gazette, as in our view the decisions of this Cort and of the Supreme Court, conclude the matter, we do not consider it worthwhile to refer to a cluster of other decisions cited by the parties.'

Shri Sarangi also relied on another decision of the Karnataka High Court in the case of Karnataka State Board Transport Corporation, Bangalore v/s. Sidhanoor Veer Bhadrappa, 1988 Lab.I.C. 896. The Karnataka High Court under similar circumstances also held that even though 30 days have lapsed since publication of the award in the Gazette, it does not mean that the Labour Court becomes functus officio and further held that an application for setting aside

ex-parte award can be entertained.

7. On perusal of the aforesaid decisions, it appears that the Division Bench of this Court in the case of M/s. IDL Chemicals Ltd. V/s. Presiding Officer, Labour Court, Sambalpur, 1991 (72)Cut. L.T. 73 [supra] took note of the decision of the Apex Court in the case of Grindlays Bank Ltd. V/s. The Central Government Industrial Tribunal, 1981 Lab I.C. 155 [supra] and found that even after expiry of 30 days from the date of publication of the award in the Official Gazette, a petition under Order 9 Rule 13, C.P.C., can be entertained with a prayer for condonation of delay. While explaining the aforesaid judgment of the Apex Court, the Division Bench of this Court has also given an illustration. After perusal of both the judgments, I am of the view that the decision of the Division Bench of this Court in the case of M/s. IDL

Chemicals v/s. Presiding Officer, Labour Court, Sambalpur [supra] in no way conflicts with the decision of the Supreme Court in the case of Grindlays Bank Ltd v/s. Central Industrial Tribunal [supra]. On the other hand this Court held that if an application under Order 9 Rule 13 C.P.C., can be entertained within 30 days from the date of publication of the award in the Official Gazette, there is no reason why such an application with prayer for condonation of delay cannot be entertained. The judgment of the Apex Court in the case of Kapra Mazdoor Ekta Union v/s. Management of M/s. Birla Cotton Spinning and Weaving Mills Ltd., 2005 Lab. I.C. 1604 [supra] deals with an application for review. The Apex Court in the said judgment held that once the dispute is adjudicated on merit, the power of review does not lie with the Tribunal. Here is a case where the

Tribunal had not decided the dispute on contest but the same was decided ex-parte. Therefore, the present case completely stands on different footing then that of the case in the aforesaid decision of the Apex Court. I am therefore, of the view that in the present facts and circumstances of the case, the Division Bench decision of tis Court in the case of M/s. IDL Chemicals Ltd v/s. Presiding Officer, Labour Court, Sambalpur [supra] has full application. The Tribunal in the impugned order, having condoned the delay by awarding cost has not committed any illegality in entertaining the application under Order 99 Rule 13 C.P.C., for setting aside the ex-parte award."

10. In view of the aforesaid observations made by the Bombay High Court and Orissa High Court in aforesaid decisions, the labour court has power and is having jurisdiction to

set aside ex parte order and award after thirty days from the date of publication and it is having power also to condone delay as per the statutory rules and, therefore, contention raised by the learned Advocate Mr.YV Shah in that regard cannot be accepted and same is, therefore, rejected.

11. In State of Maharashtra versus Ramdas Shrinivas Nayak and another reported in AIR 1982 SC 1249, the apex court has taken view that the Judge's record is conclusive, neither lawyer nor litigant may claim to contradict it except before the Judge himself but nowhere else. Relevant observations made by the apex court in para 4,5,6 and 7 of the said judgment are reproduced as under:

> 4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A. K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submission made by him in the High

Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us Judicial decorum restrains us. Matters of Judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". (Per Lord Atkinson in Somasundaran v. Subramanian, AIR 1926 PC 136). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still, fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to 'the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord

Buckmaster in Madhusudan v. Chandrabati, AIR 1917 PC 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of makingthe concession as recorded in the judgment.

4-A. In R. v. Mellor (1858) 7 Cox CC 454 Martin B was reported to have said : "We must consider the statement of the learned judge as absolute verity and we ought to take. his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity."

5. In King. Emperor v. Barendra Kumar Ghose, (1924) 28 Cal WN 170 : (AIR 1924 Cal 257) (FB), Page, J. said.

".....these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive; it is not to be criticised or circumvented; much less is it to be exposed to animad version."

6. In Sarat Chandra v. Bibhabati Debi (1921) 34 Cal LJ 302 : (AIR 1921 Cal 584), Sir Asutosh

Mookherjee explained what had to be done :

"It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge, without delay and ask for rectification or review of the judgment".

7. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge, himself, but nowhere else."

12. Similarly, in the matter of Daman Singh and others v. State of Punjab and others, etc. reported in AIR 1985 SC 973, Five Judges' Bench of the Hon'ble apex court observed as under in para 13 of the said judgment:

"13. The final submission of Shri Ramamurthi was that several other questions were raised in the writ petition before the High Court but they were not considered. We attach no significance to this submission. It is not unusual for parties and counsel to raise innumerable grounds in the petitions and memoranda of appeal etc., but later, confine themselves in the course of arguments to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable. No party or counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was

argued was not considered it should be open to the party aggrieved to draw attention of the court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be wasted in enquiring into the question whether a certain ground to which no reference is found in the judgment of the subordinate court was argued before that court or not. ?”

12. Labour court was also right in rejecting review application filed by the petitioner being Miscellaneous Application No. 5 of 2006 as it is having no power to review its own award because there is no provision of review under the ID Act, 1947 and, therefore, according to my opinion, labour court has rightly rejected review application and for that, labour court has not committed any error as it is having no jurisdiction. [See : 2006 (2) GLH 565 in case of Divisional Controller GSRTC Verus Jayantilal N. Patel and anr.]

13. As regards aforesaid four decisions cited by Mr. Shah before this Court, same have been considered by this court. In this case,

specific consent was given by the petitioner and received Rs.15000.00 as costs for restoration of original reference and based upon that consent, labour court has passed order of reopening of reference while suspending execution of recovery certificate and, therefore, in light of peculiar facts of this case, principles laid down in the aforesaid decisions which relied by Learned Advocate Mr. Shah would not apply to the facts of this case.

14. In view of the aforesaid discussion, there is no substance in this petition and same is therefore, dismissed. Notice is discharged. There shall be no order as to costs.

(H.K. Rathod,J.)

* Vyas